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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 339

THE KNOTT CORPORATION,
Petitioner,

vs.

MARY HALE FURMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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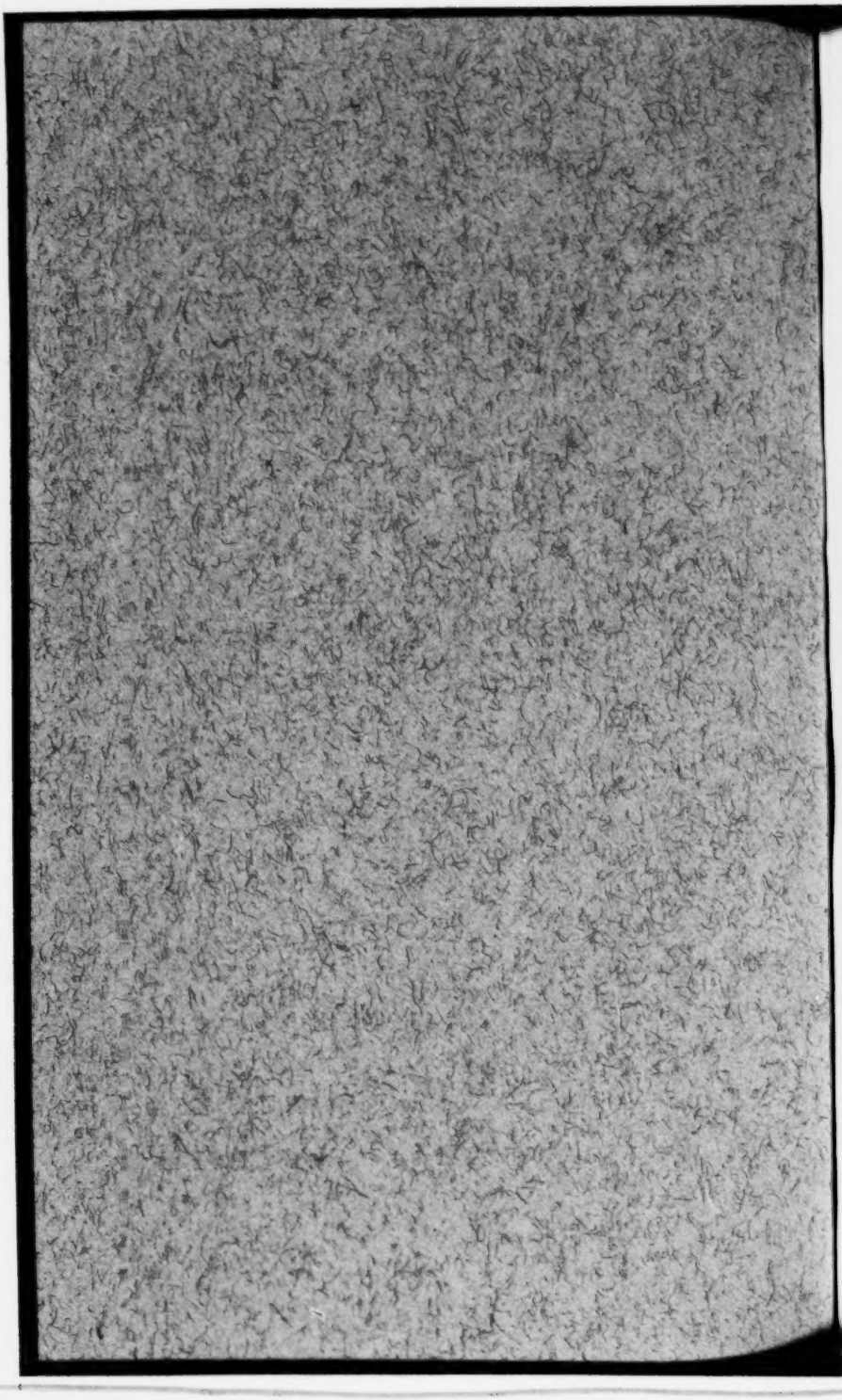

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No. 339

THE KNOTT CORPORATION,

Petitioner,

vs.

MARY HALE FURMAN.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Knott Corporation, a corporation, respectfully prays that a writ of certiorari issue to review the action of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case in affirming the judgment of the District Court of the United States for the Eastern District of Virginia.

Jurisdiction

On October 1, 1946, judgment was entered in the District Court of the United States for the Eastern District of Virginia, at Norfolk, Virginia, for the sum of $27,000.00 in favor of Mary Hale Furman against your petitioner (R. 88).

On June 16, 1947, Circuit Judges Parker and Dobie, per an opinion by Circuit Judge Parker, affirmed the judgment of the District Court (R. 156). Chief Justice of the United States Circuit Court of Appeals for the District of Columbia, D. Lawrence Groner, sitting in the Fourth Circuit by special assignment, dissented per his dissenting opinion of June 16, 1947 (R. 169). A petition for a rehearing was denied on August 13, 1947 (R. 185).

Jurisdiction to review this case upon a writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Section 6, 28 Stat. 828; Act of March 3, 1911, c. 231, Section 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938; U. S. C. A. (Title 28, Section 347).

Summary Statement of the Issues Involved

(a) Facts in Re Injury of Mary Hale Furman:

Mary Hale Furman, wife of a Lieutenant in the U. S. Navy Reserve, occupied room 541, which is located in the west wing of the U. S. Hotel Chamberlin. The hotel, as its name suggests, was owned, and as petitioner will hereinafter show, was operated by the United States Government as wartime housing for Naval and Military personnel and their families. A small fire originated in a wooden locker and the plaintiff, in attempting to lower herself from a window in her room to a roof below, was injured when the rope of bed sheets broke.

Plaintiff alleges that The Knott Corporation was the operator of the hotel and as such operator was responsible for the acts of all employees of the hotel. She alleges that servants of the hotel were responsible for the fire; that no alarm was sounded; that she was not warned that the fire was minor and presented no danger; that doors of a stairway in her wing of the hotel were left open which permitted

smoke to flood the wing of the hotel in which her room was located; that there was delay in fighting the fire; that the fire-fighting equipment was obsolete and inadequate; that the hotel employees were not instructed in the use thereof; that no fire drills were held; that the locker contained inflammable materials and was a fire hazard and that it was negligently located beneath a stairway which was reserved for the escape of guests in a fire emergency. The defendant denied that it was the operator of the hotel and denied all allegations of negligence.

Trial Facts

(b) The trial court ruled as a matter of law that petitioner was the operator of the hotel and refused to submit that issue to the jury. Over defendant's objection, the trial court submitted to the jury for their determination whether petitioner was negligent in any one of the numerous allegations of negligence hereinbefore mentioned, and the jury in a general verdict, which was affirmed by the Appellate Court, awarded the plaintiff $27,000.00.

Facts in Re Appeal

(c) The jurisdictional basis of this action is diversity of citizenship. Appellee is a citizen of the State of Massachusetts, and the petitioner is a Delaware corporation with principal offices in the City of New York, and not domesticated in, or doing any business in Virginia. The petitioner appeared specially and filed motions to dismiss on the ground that it was not a citizen of, or domiciled in or engaged in business in the State of Virginia; that the cause of action did not arise within the jurisdiction of the State of Virginia, but on the Government reservation; that the statute authorizing the institution of action in a Federal Court on the ground of diversity of citizenship provides

that suit be brought either at the residence of the defendant or petitioner, and therefore the District Court of the United States for the Eastern District of Virginia, did not have either jurisdiction or venue; that applicant had no servants or agents within the jurisdiction of the State Court on whom service could be had, and that service of process on this occasion was invalid. These pleas and motions were overruled by the Court, to which action of the Court the petitioner duly excepted (R. 15, 17).

The United States Hotel Chamberlin was owned by the United States Government, but Mrs. Furman alleged that it was operated by petitioner as an independent contractor, and that petitioner was responsible and chargeable with any and all negligent acts of the servants in the hotel. A contract in writing between the United States Government and petitioner was alleged in the complaint as showing that petitioner was the operator of the hotel. Petitioner thereupon filed a copy of said contract with the demurrer setting up that the contract showed on its face that the petitioner was not the operator of the hotel, and was not responsible for the acts of the servants of the hotel. This demurrer was overruled by the District Court. During the trial petitioner sought to introduce testimony and evidence to prove that the hotel was operated by the United States Government, and not by petitioner. At first the District Judge refused to permit the petitioner to introduce any oral testimony on this issue, holding that the written contract conclusively established the petitioner to be the operator of the hotel, and that the written contract could not be contravened by oral estimony (R. 16, 17, 56, 71). Later in the trial the District Judge for the purpose of the record only, permitted the petitioner's testimony in this connection to be introduced, but still ruled, however, that the petitioner could not be permitted by oral testimony to vary or alter the

terms of the written contract and then later on struck out all of the testimony and charged the jury that as a matter of law the petitioner was the operator of the hotel, and as such responsible for any negligent acts of the hotel employees (R. 56, 57, 71). Furthermore the District Judge refused to submit the written contract (R. 71, 74) to the jury to be considered by them together with the testimony of the witnesses, holding that the construction of the contract was a matter of law to be determined by the Court alone.

During the trial various objections and exceptions to rulings of the District Judge were made, and at the completion of plaintiff's evidence and all of the evidence of the petitioner (R. 71, 87), petitioner moved for a directed verdict. Those motions (R. 71, 87, 88) were overruled.

Numerous requests for instructions were submitted by Mrs. Furman and by petitioner (R. 85) to be incorporated in the District Judge's charge to the jury, and numerous objections were made and exceptions taken to the action of the District Judge in charging the jury erroneously, and in failing to charge the jury as requested in various requests for instructions offered by petitioner. After the verdict of the jury, the petitioner moved the Court to set aside the verdict, but that motion was overruled and judgment was entered for Mrs. Furman on October 1, 1946.

Questions Presented

1. Was it erroneous for the Circuit Court of Appeals below to hold that acts done on the Fortress Monroe Military Reservation are within the jurisdiction of the State of Virginia?

2. Was it error for the courts below to hold that there was a waiver of venue and proper service of process?

33. Was it error for the courts below to find and hold that as a matter of law petitioner operated the hotel?

4. Did the trial court err in excluding from the jury (and did the majority of the Circuit Court of Appeals below, err in sustaining the ruling of the trial court), evidence which proved that the hotel was not operated by petitioner, but was in fact wholly and solely operated by the United States Government?

Reasons Relied On for the Allowance of the Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of this petition.

First Reason

The majority of the Circuit Court of Appeals below, there being a dissenting opinion by Chief Justice D. Lawrence Groner of the United States Circuit Court of Appeals for the District of Columbia, held that a foreign corporation which was carrying out a government contract solely on a Government Military Reservation was doing business in the State of Virginia.

This holding is directly in conflict with the previous decisions of this Court in the following cases:

Standard Oil Co. v. *California,* 291 U. S. 242 (1934);
United States v. *Unzenta,* 281 U. S. 138 (1930);
Arlington Hotel Co. v. *Fant,* U. S. 278, 439 (929);
Pacific Coast Dairy v. *Dept. of Agriculture of California,* U. S. 318, 285 (1943);
Stewart & Co. v. *Sadrakula,* U. S. 309, 94 (1940);
Collins v. *Yosemite Park Co.,* U. S. 304, 518 (1938);
Murray v. *Gerrick,* U. S. 291, 315 (1934).

The decision of the majority of the court below is also contrary to the holding of the Supreme Court of Appeals of Virginia in

Bank of Phoebus v. *Byrum,* 110 Va. 708, 67 S. E. 349.

Second Reason

The majority of the Circuit Court of Appeals below in their decision held that under *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation,* 308 U. S. 165, petitioner, under Section 3846 (a) of the Virginia Code, which provided that a corporation doing business in the State of Virginia which failed to file a written power of attorney with the Secretary of the Commonwealth should by "doing business" in the State of Virginia, "be deemed" to have appointed the Secretary of the Commonwealth its agent upon whom process could be served, waived the privilege of venue provided by Section 51 of the Federal Judicial Code (U. S. C. A., Title 28, Section 112).

This ruling of the majority of the court below is in direct conflict with the following decisions of the United States Circuit Court of Appeals for the second, third and ninth circuits in the following cases:

Moss v. *Atlantic Coast Line R. Co.,* 149 Fed. (2d) 701, (C.C.A. 2d, 1945);

Robinson v. *Coos Bay Pulp Corp.,* 147 Fed. (2d) 512 (C.C.A. 3rd, 1945);

Cummer-Graham v. *Straight Side Basket Corp.,* 136 Fed. (2d) 828 (C.C.A. 9th, 1943).

Third Reason

The majority of the Circuit Court of Appeals below in its opinion held that the evidence showed as a matter of law, that petitioner operated the United States Hotel Chamberlin located on the Fortress Monroe Military Reservation.

This is in direct conflict with all the evidence introduced in the case. The only evidence introduced in this connection was introduced by petitioner, and not by plaintiff. All of petitioner's evidence showed the hotel was operated by the United States Navy, "lock, stock and barrel."

Fourth Reason

The trial judge prior to the trial of the case ruled as a matter of law, that the written contract (R. 15, 74) showed petitioner to be the operator of the United States Hotel Chamberlin. He at first refused to permit petitioner to introduce any testimony which would show that the actual operator was not petitioner, but was the United States Navy, and gave as his reason for such ruling that oral testimony could not be introduced to vary or alter the terms of the written contract. Finally, to vouch for the record only, the trial court permitted petitioner to introduce its evidence in this connection, and then charged the jury (R. 56, 74) that this evidence was not to be considered by them, as the court had already ruled as a matter of law, that petitioner was the operator of the hotel, and was responsible for all acts of negligence committed by any of the hotel employees. The majority of the Circuit Court of Appeals below sustained the trial court in this ruling, and their reason for so doing was stated in their opinion to be "the evidence shows conclusively that plaintiff was operating the hotel."

The ruling of the trial court that oral testimony could not be introduced to vary or alter the terms of the written instrument is in direct conflict with all of the authorities which are to the effect that the parole evidence rule applies only between parties to the instrument and does not apply to a third person (See 32 *Corpus Juris Secundum,* Section 861, Evidence, and cases there cited, also *Gulf Refining Co.* v. *Brown,* 93 Fed (2d) 870 (C. C. A. 4, 1938), opinion by Judge Soper, the court being constituted of Circuit Judges Parker and Northcott and Soper).

When it is understood that the only testimony introduced was that of petitioner, and that the trial court sustained the objections of plaintiff's counsel and only permitted the petitioner's evidence to go in for the purpose of vouching the

record, it will be seen that there can be no reasonable basis for the conclusion announced by the majority of the court below. In fact, the majority of the court below admit (R. 158) "* * * The defendant was restricted in many ways in the operation of the hotel. * * *"

From the foregoing it will thus be seen that, to say the very least, there was a strong conflict in the evidence with reference to the operation of the hotel, and that issue should have been submitted to the jury as an issue of fact for the jury's determination.

Prayer for Writ of Certiorari

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of your Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit requiring that court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the Record and proceedings in the case No. 5589, and entitled *The Knott Corporation, appellant,* v. *Mary Hale Furman;* and that the action of the said United States Circuit Court of Appeals for the Fourth Circuit as announced in its decision dated June 16, 1947 affirming the judgment of the District Court of the United States for the Eastern District of Virginia entered by said court on October 1, 1946, may be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

HARVEY E. WHITE,
E. L. RYAN, JR.,
F. M. SCHLATER,
EDWIN C. KELLAM,
JOHN W. OAST, JR.,
Counsel for Petitioner.

Certificate

I hereby certify that I am a member of the bar of the Supreme Court of the United States; that I am of counsel for The Knott Corporation, the petitioner herein; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation; and that in my opinion said petition is well founded in law and in fact, and should be granted.

JOHN W. OAST, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 339

THE KNOTT CORPORATION,

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MARY HALE FURMAN

Petitioner,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The facts in this case, the proceedings had in the courts below, the jurisdictional statement, the questions presented and the reasons why a writ of certiorari should be granted, having been set out in the petition for a writ of certiorari, will not, in the interests of brevity, be here repeated.

Specifications of Error

1. It was error for the majority of the Circuit Court of Appeals below to hold that acts done on the Fortress Monroe Military Reservation are within the jurisdiction of Virginia.

2. It was error for the courts below to hold that there was venue and proper service of process.

3. It was error for the courts below to find and hold that as a matter of law petitioner operated the hotel.

4. It was error for the trial court to exclude from the jury (and for the majority of the Circuit Court of Appeals to sustain the ruling of the trial court), evidence which proved that the hotel was not operated by petitioner, but was, in fact, wholly and solely operated by the United States Government.

Point I

Acts Done on the Fortress Monroe Military Reservation Are Not Within the Jurisdiction of the State of Virginia

In the language of the majority of the court below:

> "We come, then, to the question as to whether the application of the statute is different because the business done was on the Fort Monroe Military Reservation. We do not think so. * * * The land contained in the Reservation was ceded by the State of Virginia to the United States by Act of March 1, 1821, which contained the following provision:
>
> > "* * * that the cession shall not be construed or taken so as to prevent the officers of the State from executing any process or discharging any legal functions within the jurisdiction or territory herein directed to be ceded."
>
> "If this provision means anything, it means that the laws of the State of Virginia with reference to the service of process run throughout the reservation. This means, of course, not only that state officers may go upon the Reservation to serve process, but also that the state laws as amended from time to time will determine what acts on their part constitute service. * * * If it could do this, there is no reason why its general laws with reference to service on foreign corporations should not be held applicable to foreign corporations doing business within the Reservation."

The foregoing quotation seems to indicate that the majority of the court below has confused service of process

with jurisdiction. The issue is not whether state officers had the right to serve process on the Reservation, but whether doing business on the Reservation is equivalent to doing business in the State of Virginia.

The Supreme Court of Appeals of the State of Virginia, has expressly disclaimed any jurisdiction over the Fortress Monroe Military Reservation, and for the State of Virginia has held just the contrary to what the majority of the Circuit Court of Appeals below now seeks to hold. In *Bank of Phoebus* v. *Byrum,* 110 Va. 708, 67 S. E., 349, the facts were that Byrum, who was born in North Carolina, enlisted in the Army at Fortress Monroe and was stationed there for 12 years. An attachment was sued out and levied on effects belonging to Byrum, and the lower court sustained a motion to quash the attachment on the ground that Byrum was a resident of the State of Virginia, and was not a non-resident as alleged in the attachment. The Supreme Court of Appeals reversed the lower court decision and in its opinion cited the case of *Ft. Levenworth R. Co.,* v. *Lowe,* 114 U. S. 525, 29 L. Ed. 264, 5 Sup. Ct. 995.

> "* * * The reservation which has usually accompanied the consent of the states civil and criminal process of state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them. * * *"

Continuing, the Virginia Supreme Court of Appeals said:

> "For the foregoing reasons we are of the opinion that the defendant in error did not acquire a residence in the State of Virginia by reason of having enlisted in the Army of the United States and resided as such enlisted soldier at Fortress Monroe. * * *"

The claim of the majority of the court below that a state ceding the land comprising a federal reservation can sub-

sequently enact legislation affecting the reservation, was ruled erroneous in the case of *Arlington Hotel* v. *Fant, et al.* 278 U. S. 439 (1929) where it was held that an Arkansas statute passed subsequent to the acquisition of the land comprising the reservation was without force so far as the reservation was concerned.

Fortunately the very point at issue has already been decided in the case of *Standard Oil Co.* v. *California,* 291 U. S. 242 (1934). In that case the State of California levied a license tax upon every distributor for each gallon of motor vehicle fuel "sold and delivered by it in this state." The Standard Oil Company, a foreign corporation, qualified to do business in California, sold and delivered to the post exchange within the Presidio of San Francisco, 420 gallons of gasoline. It carried this to the exchange's place of business in barrels or by tank trucks. The State demanded of the corporation 3¢ per gallon upon the gasoline so sold and delivered, and payment being refused the suit followed. As in the case at bar, the land comprising the military reservation was ceded by the State of California to the United States with the reservation, "that this State reserves the right to serve and execute on said land, all civil processes not incompatible with this cession, and such criminal processes as may lawfully issue under the jurisdiction of this State against any person or persons charged with crimes committed without said land."

In its opinion the court said:

> "In three recent cases—*Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447, *United States* v. *Unzeuta,* 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761, and *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091—we have pointed out the consequences of cession by a state to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the act of 1897 California surrendered every

possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein."

"The principle approved in those cases applies here. A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

The majority opinion of the Circuit Court of Appeals below is in direct conflict with the decisions of this Court and of the Supreme Court of Virginia, *supra*. It will be noted that although the majority of the court below has cited numerous authorities for all of its holdings in the other matters referred to in the opinion, it is not without significance that it has failed to cite a single authority in support of its views, or to distinguish or comment on any of the authorities herein cited, although all of these authorities were contained in petitioner's original brief, and/or are cited and referred to by Chief Justice Groner of the Supreme Court of Appeals for the District of Columbia in his dissenting opinion below.

Although there was no evidence on the subject and although the majority of the court below throughout its opinion has made no reference to petitioner doing business anywhere else than on the Fortress Monroe Military Reservation, during the course of its discussion, they make the following remark:

"Corporations doing business on a reservation *may* come in contact with the citizens of Virginia and do business with them in the same way as foreign corporations doing business elsewhere within the state." * * * (Italics supplied).

Petitioner suggests that here the majority of the court below has reached a conclusion based on an assumption,

rather than on evidence, and that the court could just as reasonably draw the same inference with respect to all corporations located in a state or territory contiguous to or near the boundary line of Virginia.

Furthermore it is an undisputed fact that the petitioner here was performing a contract let by the government as a part of its war effort and there certainly does not exist any power of the State of Virginia, by any law, to interfere in any way with its war effort on its own military reservation and over which it has exclusive jurisdiction. In 14-A *Corpus Juris*, page 1256 it is said:

> "So every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or *conditions imposed by the latter.*"

In the case of a *Mercantile Trust Co.* v. *Texas & P. Ry. Co.*, 216 Fed. 225, the court said:

> "It is clear that when Congress has the power, under the Federal Constitution, to adopt and use, for the convenience of the operations of the federal government, a corporation of *any kind* as its agency, in such a case a State Legislature cannot, *in any manner*, interfere with the operations of such agency so employed by Congress for federal government purposes. The states cannot deny these federal corporations the right to enter the states, or do business in the states. Neither can they announce conditions for non-compliance with which the federal corporations will be excluded from the states. *And it is inconceivable that the state could exclude from their borders the federal corporations used as government agencies when those corporations decline to surrender their rights to litigate in the Federal Courts.*" (Italics supplied).

See also:

Pullman Co. v. *Kansas,* 216 U. S. 56;
Waters-Pierce Oil Co. v. *Texas,* 177 U. S. 28;
Hooper v. *California,* 155 U. S. 648;
Horn Silver Mining Co. v. *New York,* 143 U. S. 305;
Pembina Consol. Silver Co. v. *Penna.,* 125 U. S. 181;
Packet Co. v. *James,* 32 Fed. 21;
Stockton v. *Baltimore, etc., R. Co.,* 32 Fed. 9.

Point II

Petitioner Did Not Consent to Suit in Virginia and No Venue Exists

A motion to dismiss was seasonably made by petitioner when this action was brought in the District Court below. As it was admitted that the plaintiff is a citizen of Massachusetts, and petitioner is a Delaware corporation with its principal offices in New York, it is beyond question that in order to comply with Section 51 of the Judicial Code (Title 28, U. S. C. A. Sec. 112), suit could not be instituted in the U. S. District Court for the Eastern District of Virginia, but would have to be instituted either in Massachusetts or in Delaware; the residence of either the plaintiff or defendant. But plaintiff claimed that under Section 3846(a) of the Code of Virginia, petitioner had waived its right to demand that suit be brought in Massachusetts or Delaware, and that venue in Virginia was proper.

Section 3846(a) of the Code of Virginia in substance, provides that any foreign corporation *doing business in the State of Virginia,* shall by written power of attorney, appoint the Secretary of the Commonwealth its true and lawful attorney for the purpose of service of process, and that

if any such company shall do business in this State without having appointed the Secretary of the Commonwealth its true and lawful attorney as required herein, it shall by doing such business in the State of Virginia, "be deemed to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney for the purpose hereinafter set forth" (R. 16).

Plaintiff claimed that doing business on the Fortress Monroe Reservation was doing business in the State of Virginia, and that the service obtained by plaintiff on the Secretary of the Commonwealth was a valid service and that such doing business constituted a waiver of venue under the diversity of citizenship statute. The courts below sustained the view of the plaintiff and held that petitioner had waived venue and was subject to suit in Virginia. The basis for this rule is the case of *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165, in which it was held that the plea of improper venue "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election," and the court continuing said:

> "• • • Being a privilege it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."

Since petitioner seasonably asserted its plea of improper venue, and did not formally submit to venue in Virginia, the only remaining ground is that of submission through conduct. This is the sole and only claim of venue asserted by plaintiff and if plaintiff's position is tenable, it must rest solely on the Virginia statute, 3846(a) above cited. The claim therefore is and necessarily must be that the petitioner was doing business in the State of Virginia and that this constituted submission to venue "by conduct."

Petitioner has already shown (Point I *supra*) that it was not doing business in Virginia, but for the purpose of this discussion we will assume that petitioner was "doing business" in Virginia.

Prior to *Neirbo* v. *Bethlehem Shipbuilding Corporation, supra,* it had already been decided, as pointed out in the majority opinion of the Circuit Court of Appeals below, that service of process under state statutes requiring the appointment of an agent for the purpose of service of process constituted valid service. But, as service of process and venue are two separate and distinct things, all of their prior decisions, as pointed out in the dissenting opinion in the *Neirbo* case, held that this did not affect the right of a foreign corporation or non-resident, where suit was brought in a federal court under Section 51 of the federal code to insist on the privilege of venue. The *Neirbo* case, to the extent that where it appeared a foreign corporation had filed consent to suit as required by a state statute, modified these previous decisions and held that consent to suit was equivalent to a waiver of venue in a federal court and that the foreign corporation was estopped to plead improper venue.

Since the *Neirbo* decision, the lower courts have not been uniform in deciding just how far that decision went. In the two non-resident motorist cases of *Kreuger* v. *Hider,* 48 Fed. Supp. 708, and *Steele* v. *Dennis,* 62 F. Supp. 73, two District Courts in the Fourth Circuit carried the *Neirbo* case a step further and held that the State statutes providing that the privilege of the use of the State's highways should be deemed a consent to be sued and providing for service on a statutory agent, constituted a constructive or implied waiver of venue under Section 51 of the Federal Code.

In the case of *Moss* v. *Atlantic Coast Line R. Co.,* 2 Cir.,

149 F. (2d) 701, *Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 9 Cir., 136 F. (2d) 828; *Robinson* v. *Coos Bay Pulp Corp.*, 3 Cir., 147 F. (2d) 512, where the specific question involved was whether service of process under State statutes prohibiting the doing of business unless the statutory agent was first appointed, constituted a waiver of venue, the reverse was held and it was said that only actual consent to be sued could constitute a waiver, as the court in the *Neirbo* case expressly stated that *Re Keasby & Mattison Co.*, 160 U. S. 221, was not overruled.

The majority of the court below adopted the *Kreuger* v. *Hider, supra* and *Steele* v. *Dennis, supra,* cases as being controlling in the case at bar, and attempt to distinguish the *Cummer-Graham Co.* v *Straight Side Basket Corp., supra,* and other similar cases, on the ground that in none of the latter cases was there a State statute providing "that the appointment of a State agent for the service of process would be presumed from doing business in the State."

The majority of the court below only refer to subsections 1, 2, 3 of Section 3846(a) of the Code of Virginia and all of these subsections end with the phrase:

> "• • • its true and lawful attorney for the purposes hereinafter set forth."

It is therefore necessary to find what are the purposes "hereinafter set forth." Subsection 5 of the statute sets out these purposes as follows:

> "• • • any lawful process against or notice to such corporation or company in an action or proceeding against it *growing out of such business* may be served on the Secretary of the Commonwealth, and filing such power of attorney or doing such business in Virginia shall be a signification of its agreement that any such process or notice so issued *shall be of the same legal force and validity as if served upon it in the State of Virginia.*" (Italics supplied.)

It will be observed that under the language of this statute a foreign corporation merely agrees that any process or notice shall have the same force and effect as if served in the State of Virginia. It does not require the corporation to waive any of its rights or defenses that it might have in the matter litigated.

This statute does not support the distinction sought to be made by the majority of the court below. Suppose in the non-resident motorist cases of *Kreuger* v. *Hider, supra,* and *Steele* v. *Dennis, supra,* the defendants had been personally served with process, instead of by mail, as provided by the statute. Certainly the personal service of process would be just as effective, if not more so, than service by mail. Now suppose that the non-resident motorists sought to remove their cases to the Federal court on the ground of diversity of citizenship. Can there be any doubt of such right to remove? The majority of the court below agree that removal to the Federal court could be had, and they say:

> "Certainly no purpose of justice is served by permitting a defendant to be sued in the State but not the Federal courts in a situation such as this, where the defendant himself unquestionably has the right to remove the case to the Federal courts if sued in the State courts."

And further on the majority of the Court below say:

> "To hold that it should be given effect for one purpose but not for the other would not only be illogical but would result in the anomaly of permitting the defendant to be sued in the State but not in the Federal courts, although all the elements of Federal jurisdiction are present and *although defendant would itself have the right to remove the case into the Federal court if sued in the courts of the State.* (Italics supplied.)

The fallacy of this statement by the majority below is apparent when the ruling of the *Neirbo* case and its implications are given thoughtful consideration, for in speaking of the waiver of venue by consent, Justice Frankfurter said (p. 171):

> "The consent therefore extends to *any court* sitting in the State which applies the law of the State."

This statement of Justice Frankfurter makes it very clear that "the consent" to be sued, is a consent to be sued, in any court of the State, whether such court is a State court or a Federal court, and "the consent" is a waiver of venue and precludes the filing of a plea to the venue. If, therefore, the corporation cannot plead improper venue when sued in a Federal court in the State, neither can the corporation remove the case to a Federal court when sued in a State court. The removal privilege is a venue privilege which may be waived. In fact, it is held to be waived, unless the removal application is seasonably made.

It is clear, then, that "the consent" in the *Neirbo* case was such as to preclude the corporation there from pleading improper venue, whether in removal proceedings or otherwise. But under the wording of Section 3846(a) of the Code of Virginia, no such "consent" is given and therefore under the statute petitioner did not waive venue either in removal proceedings or otherwise, nor did it waive its right to seasonably assert its pleas of improper venue in the original action in the District Court below. If the language of Section 3846(a) would permit the foreign corporation to remove to a federal court, then, necessarily, there is no waiver of venue. If there is no waiver of venue in the removal case, then *a fortiori* there is no waiver of venue in the case at bar, as has been held by the majority

of the court below, because Section 3846(a) (sub-section 5) provides only that the process or notice so issued:

> "• • • shall be of the same force and validity as if served upon it in the state of Virginia."

By analogy with the non-resident motorist cases, suppose a foreign corporation's agent had an accident in the State of Virginia, and proper service was had on the foreign corporation in Virginia, it could unquestionably remove the case to the federal court. Section 3846(a) expressly provides that service has only the same "validity as if served • • • • in the State of Virginia," so unquestionably the corporation could remove to a federal court.

In this connection we quote the dissenting opinion of Chief Justice Groner of the U. S. Circuit Court of Appeals for the District of Columbia:

> "I think the judgment below should be reversed and the action dismissed for improper venue. The suit is based on diversity of citizenship and was not brought in the district of the residence of either the plaintiff or the defendant, and nothing in the nature of a waiver is shown, as in the case of *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165 (1939). The cause of action arose on a military reservation belonging to the United States and over which the United States had and exercised "entire jurisdiction," and which by the act of cession Virginia had put beyond the field of the operation of her law."

Point III

It Was Error for the Courts Below to Hold That as a Matter of Law Petitioner Operated the Hotel, and to Exclude from the Jury Evidence in Re Petitioner's Non-Operation.

The majority of the Circuit Court of Appeals below, in its opinion (157-8) specified the following as the important questions to be decided:

> "The most important question before us is that relating to venue. * * * Plaintiff contends that the venue is proper because the defendant, by *doing business within the State of Virginia,* has consented to the suit and service of process there under applicable Virginia statute *and has* waived venue as to cases instituted against it in the federal courts of that state. * * *
>
> "The first contention of defendant, which is basic not only on this question of venue, but also on the question of negligence, later to be considered, is that it was not operating the hotel at all, and hence was not doing business in such way as to subject it to service of process under the Virginia statute or render it liable in connection with the fire that occurred. * * * There is nothing to this contention. The *evidence* shows conclusively that plaintiff was operating the hotel * * * " (Italics supplied).

The last sentence quoted deserves to be examined carefully, because it forms the keystone of the majority opinion. On this premise that the *evidence* shows conclusively that petitioner operated the hotel, the entire opinion is based.

How the majority of the Circuit Court of Appeals could have reached the conclusion that the *evidence* showed petitioner to be the operator of the hotel is really a mystery. During the trial of the case petitioner tried to introduce evidence that petitioner did not operate the hotel and that in fact the hotel was operated by the Navy "lock, stock and

barrel." Plaintiff's counsel strenuously resisted every effort made by petitioners to introduce this evidence, and for a long time the trial court refused to permit petitioner to introduce any evidence on this issue, holding that the court had already ruled *prior to the trial that as a matter of law petitioner was the operator of the hotel* (R. 15, 17, 56, 74). Finally, at the insistence of petitioner, the trial court, to vouch for the record and for no other purpose, permitted petitioner to introduce evidence on this issue, but refused to submit the issue to the jury, and instructed the jury that they could not consider such evidence, as the court had already ruled, as a matter of law, that the petitioner operated the hotel and was responsible for any negligence of the hotel employees (R. 56, 57). *Plaintiff's counsel did not introduce any testimony whatsoever on this basic issue, insisting that no oral testimony was admissible to alter or vary the terms of the written contract between petitioner and the U. S. Government. The only testimony in the record on this issue was that introduced by petitioner, which definitely and conclusively showed the United States Navy to be the sole operator of the hotel.* Lieutenant Charles S. Crocker, who was the United States Navy Officer in Charge, testified "the Navy ran the rotel, lock stock and barrel" (R. 51, 52). J. H. Shoemaker (R. 53) who was resident manager, testified, "I was employed by the United States Navy" and that he worked under the Navy Officer in Charge, Lieutenant Charles S. Crocker. Yearsley A. Price, Vice-President of petitioner, testified that petitioner only advised the Navy in connection with hotel operations and that the "No. 1 Boss" was Captain Bicklehaupt, U.S.N., and the "No. 2 Boss" was Lieutenant Crocker, U.S.N.R. (R. 66). Furthermore there was a sign prominently displayed

over the Clerk's desk in the lobby of the hotel reading "U. S. Hotel Chamberlin, owned and operated by the U. S. Navy" (R. 24). The majority opinion does not point out any evidence contrary to this evidence of petitioner, and it would be interesting to know just what evidence there is in the record to justify their statement that,

> "The *evidence* shows conclusively that plaintiff was operating the hotel * * *" (R. 158).

Quoad plaintiff's contention that oral testimony cannot be introduced to alter or vary the terms of a written instrument, we call attention to the numerous decisions holding that this rule applies only to the parties to the contract and does not apply *in re* a controversy between a party to the contract and a third party. (See 32 *Corpus Juris, Secundum,* Sec. 861, Evidence, and cases there cited. Also *Gulf Refining Co.* v. *Brown,* 93 Fed (2d) 870 (C.C.A. 4, 1938). Furthermore, by the terms of the contract itself this evidence was clearly admissible, because Article 12 of the contract (R. 10) reads as follows:

> *"The Government reserves the right at any time to furnish any of the services, materials, articles, supplies or equipment contemplated by the contract."*

Petitioner clearly had the right to prove that the Government had, in fact, exercised this reservation, and we earnestly submit that it was error for the court to refuse to consider this evidence, or to exclude it from the jury's consideration.

Conclusion

For the reasons set out in the petition for a writ of certiorari, *supra,* and reasons set out herein, the writ of certi-

orari should be granted to the United States Court of Appeals for the fourth circuit in this case.

Respectfully submitted,

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